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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. CORY HERBST, Defendant and Appellant.	H044623, H045106 (Santa Clara County Super. Ct. Nos. C1633456, C1637564)

I. INTRODUCTION

On January 23, 2017, in case No. C1633456, a jury found defendant Cory Herbst guilty of possession of methamphetamine for sale on January 20, 2016 (Health & Saf. Code, § 11378),[1] and the trial court found true the allegations that defendant had previously been convicted of transportation of a controlled substance (§§ 11370.2, subd. (c), 11379; Pen. Code, § 1203.07, subd. (a)(11)) and had suffered a prior prison term (Pen. Code, § 667.5, subd. (b)). On April 17, 2017, the trial court sentenced defendant to five years in prison.

On April 20, 2017, in case No. C1637564, defendant pleaded no contest to, on May 10, 2016, two counts of manufacturing methamphetamine (§ 11379.6, subd. (a);

[1] All further statutory references are to the Health and Safety Code unless otherwise indicated.

counts 1 and 6); two counts of possession of methamphetamine for sale (§ 11378; counts 2 and 7); transportation of methamphetamine (§ 11379, subd. (a); count 3); possession of phencyclidine for sale (§ 11378.5, subd. (a); count 4); transportation of phencyclidine (§ 11379.5, subd. (a); count 5); maintaining a place for unlawful activities involving controlled substances (§ 11366; count 8); possession of a firearm by a felon (Pen. Code, § 29800, subd. (a)(1); count 9); and possession of ammunition by a felon (Pen. Code, § 30305, subd. (a)(1); count 10). Defendant admitted the allegations that he was personally armed with a firearm during the commission of counts 6, 7, and 8 (Pen. Code, § 12022, subd. (c)); he was released on bail when he committed the offenses (Pen. Code, § 12022.1); and he had suffered a prior prison term (Pen. Code, § 667.5, subd. (b)). On July 18, 2017, the trial court sentenced defendant to six years in case No. C1637564 and resentenced defendant to eight months in case No. C1633456, for a total aggregate sentence of six years eight months.

On appeal, defendant contends in case No. C1633456: (1) the trial court erred when it admitted evidence of defendant's subsequent possession of methamphetamine and methamphetamine manufacturing materials on May 10, 2016, pursuant to Evidence Code section 1101, subdivision (b); (2) the trial court violated defendant's right to compulsory process when it permitted two prospective witnesses to invoke their Fifth Amendment privilege against self-incrimination; and (3) the trial court erred when it denied defendant's request to move out-of-court statements by the two prospective witnesses into evidence as declarations against penal interest. Defendant raises no issue in case No. C1637564.

For reasons that we will explain, we will affirm.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. *The Charged Offense (January 20, 2016)*

On January 20, 2016, Santa Clara Police Officer Doug Bell contacted defendant in the parking lot of the Western Motel in Santa Clara. Officer Bell knew that defendant

lived in room 110 at the motel. Defendant told Officer Bell that "his friend named Jimmy," referencing his codefendant, James Marciano, was staying with him.[2] Defendant was excited to tell Officer Bell that he was sober.

Officer Bell observed that defendant displayed objective signs of being under the influence of methamphetamine. Defendant's pupils were nonreactive, his speech was rapid, and he was sweating profusely. Officer Bell asked defendant whether he had recently used drugs, and defendant responded that he had used drugs the previous night. He also told Officer Bell that he was carrying a methamphetamine pipe, but no pipe was found on him. Defendant had $532 in cash. Defendant had no explanation for the money.

Defendant consented to a search of his room. Room 110 had two bedrooms, one in front and one in back. The back bedroom had a kitchenette near a back door to the room. Officer Bell found Marciano sitting on the bed in the back bedroom. Marciano was "startled and started ranting" that Officer Bell could not enter the room without a warrant. Marciano then left. Officer Bell found a glass pipe, .20 grams of methamphetamine, and a cell phone on the kitchenette's countertop. Officer Bell also located 22.51 grams of methamphetamine hidden between some dishes in a kitchen cabinet. Officer Bell estimated that Marciano was five to six feet away from the methamphetamine on the countertop and eight to ten feet away from the methamphetamine in the cabinet when Officer Bell walked into the room. A piece of mail addressed to defendant at the motel's address and a bottle of acetone were also found in the room. Acetone can be used to manufacture methamphetamine. A search of Marciano revealed a $17,000 cashier's check in his pants pocket.

Defendant gave Officer Bell permission to search the cell phone found on the kitchen counter, which Officer Bell understood as defendant's acknowledgment that he

[2] The codefendant is not a party to this appeal.

owned the phone. Officer Bell thought that a number of text messages on the phone were indicative of narcotics transactions. One outgoing message on January 11 stated, " 'Hey, Ron. It's Bam Bam. . . . Are you home? 'Cause I'm going to come by this morning if it's okay.' " Then, on January 16, an outgoing message stated, " 'Hey, Ron, this is Bam Bam. My Buddy is waiting for his friend who should be within [*sic*] 30 min. Do you still want that?' " The phone also contained text messages from someone named Mark on January 20. The first message from Mark stated, " 'Hey, brother, tell Bam Bam 2500." The outgoing message asked in response, "[F]rom Larry [?][3]" Mark stated, " 'No, my other boy. . . . Larry ain't calling me back.' " The outgoing message in response stated, " 'Cause he got bunk. He's been here most of the morning looking for good.' " Then Mark stated, " 'It's not from Larry. You want me to set it up or what?' " The outgoing message asked, " 'Good, right[?][4]" Mark's next incoming message said, " 'You can come try it before you buy it.' " The outgoing text message in response stated, " 'Cory just step out. Let me get back to you in a minute.' "

Santa Clara Police Detective Greg Deger testified at trial as an expert in the possession of methamphetamine for sale. In Detective Deger's experience, methamphetamine dealers also use methamphetamine. He could not "ever recall in [his] career speaking to somebody who was engaged in sales activity that wasn't also a user themselves." Methamphetamine users typically do not possess a lot of methamphetamine at one time because a small amount can be discarded more easily to avoid police detection and the risk of theft of a small amount is lower. Detective Deger found that methamphetamine users usually possess one gram, or less than one gram, of methamphetamine. A heavy methamphetamine user will consume one gram per day and

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[3] The reporter's transcript states that the outgoing message said, "from Larry question mark."

[4] The reporter's transcript states that the outgoing message said, "Good, right, question mark."

between five to seven grams per week. Some heavy users support their drug habit by selling methamphetamine.

Detective Deger opined that 22.51 grams of methamphetamine is more than a typical user would possess at one time. One gram of methamphetamine can be purchased for approximately $20. In January 2016, the price for one ounce of methamphetamine was approximately $250 to $400. There are 28.35 grams in an ounce. Usually methamphetamine dealers do not carry a large quantity of methamphetamine on them; it's often concealed somewhere nearby. Detective Deger has come across two or more people selling drugs together. In Detective Deger's experience, drug sales are often "facilitated via text message [and] Facebook messenger."

Detective Deger testified that possession of .20 grams of methamphetamine is not consistent with possession for sale. He also stated that possession of 22.51 grams of methamphetamine is not consistent with possession for personal use. In his opinion, 22.51 grams of methamphetamine is "an extremely high amount." Even with the heaviest use, such an amount would be more than a month's worth of methamphetamine. In his experience, users typically do not possess a month's supply of methamphetamine. It is also not typical for drug dealers to leave their supply of drugs unattended.

Detective Deger opined that based on their wording, some of the text messages on the cell phone found in room 110 could have been related to drug sales. The messages relayed amounts and one used the term " 'bunk,' " which refers to bad drugs. Also, Detective Deger knew that the phone number associated with the person named "Mark" was the same number held by Mark Crawford, whom Detective Deger arrested in November 2015 for possessing 34.1 grams of methamphetamine.

Based on the amount of the methamphetamine, the amount of money, and the nature of the text messages, Detective Deger opined that defendant and Marciano possessed the methamphetamine for the purpose of sale.

On cross-examination, Detective Deger opined that the text message from "Mark" stating, " 'Hey, brother, tell Bam Bam 2500,' " could be interpreted as Mark offering to sell drugs for $2,500. He could also have been facilitating a drug sale. According to Detective Deger, "[P]eople that have chosen this lifestyle and will engage in this type of activity can take various roles . . . so they can buy an amount and then in turn sell the amount [so] they are both a buyer and seller."

B. *The Uncharged Offenses (May 10, 2016)*

On May 10, 2016, Santa Clara Police Officer Anthony Pianto pulled defendant over near the Western Motel. When Office Pianto contacted him, defendant seemed nervous and displayed objective signs of being under the influence of a controlled substance. Defendant was sweating, talking rapidly, and had nonreactive pupils. A pipe and $100 in $20 denominations were found on him. A search of the car revealed a plastic bindle of approximately 9.1 grams of methamphetamine located in between the driver's seat and the center console. The methamphetamine appeared to be wet, which indicated to Officer Pianto that it had been recently manufactured. Inside the car's trunk, Officer Pianto found numerous chemicals, including acetone, and glassware wrapped in electrical tape.

Police obtained a warrant to search room 110 at the Western Motel. There, police found iodine, red phosphorus, muriatic acid, and acetone. Police also located four scales and some glassware, including a flask, that was similar to the glassware found in the trunk of the car. The glassware had white residue on the bottom. A glass dish in a safe underneath the kitchenette's sink contained a brown, crystalized substance that appeared to be methamphetamine residue. The brown residue weighed 4.4 grams.

Outside the back door of room 110, Officer Pianto located a scale and a small black case containing three bindles of methamphetamine, weighing a total of 4.8 grams. Like the methamphetamine found in the trunk, the methamphetamine in the three bindles appeared to be wet. Both the bindle found in the car and the three bindles located in the

black case appeared to be packaged for sale. Officer Pianto also searched a storage unit located at the motel, finding similar glassware and three coolers containing various chemicals.

Campbell Police Officer Michael Short testified as an expert on the manufacture of methamphetamine and the identification of methamphetamine labs. The chemicals and glassware found in the trunk of the car could be used to manufacture methamphetamine. The chemicals found in room 110, namely, iodine, red phosphorus, muriatic acid, and acetone, could also be used to manufacture methamphetamine. Officer Short testified that the chemicals found in the storage room were not related to manufacturing methamphetamine, but the glassware found there could be used to manufacture methamphetamine.

Officer Short opined that the chemicals found in the trunk of the car were not possessed for an "innocent" purpose because he could not think of another reason someone would transport those chemicals together and because there was "actually finished methamphetamine" with "a wet appearance" in the car. Officer Short also opined that the glassware found in room 110 was being used to manufacture methamphetamine based on the stained crystalline residue on the bottom of the glass.

C. *Charges, Verdict, and Sentence*

Defendant was charged with possession of methamphetamine for sale (count 1; § 11378) and using or being under the influence of a controlled substance (count 2; § 11550, subd. (a)). The prosecution also alleged that defendant had been previously convicted of transportation of a controlled substance (§§ 11370.2, subd. (c), 11379; Pen. Code, § 1203.07, subd. (a)(11)) and using or being under the influence of a controlled substance (§ 11550; subd. (b)), and had suffered a prior prison term (Pen. Code, § 667.5, subd. (b)).

The trial court granted the prosecution's motion to dismiss count 2 and the attendant section 11550 allegations at the outset of trial. The jury found defendant guilty

of possession of methamphetamine for sale, and the trial court found the prior conviction allegation and prior prison term allegation true. The trial court sentenced defendant to five years.[5] The trial court then modified defendant's sentence to eight months at the time of his sentencing in case No. C1637564.

III. DISCUSSION

A. *Admission of Uncharged Offenses*

Defendant contends the trial court erred when it admitted evidence regarding his May 10, 2016 possession of methamphetamine and methamphetamine manufacturing materials pursuant to Evidence Code section 1101, subdivision (b). Defendant asserts that the evidence "was not probative of any material, disputed fact" and that "any marginally probative value of the evidence was substantially outweighed by the risk of prejudice." We conclude the trial court's admission of the evidence was not an abuse of discretion.

1. Proceedings Below

The prosecution moved in limine to present evidence regarding the circumstances of defendant's April 17, 2000 and May 10, 2016 arrests for violating section 11378. The prosecution asserted that the evidence was admissible under Evidence Code section 1101, subdivision (b) to prove defendant's "knowledge of, and intent to sell, methamphetamine in the current case." Defendant objected, arguing that "his intent [was] irrelevant" because his anticipated defense was that Marciano possessed the methamphetamine, not him. He also asserted that the circumstances of the May 10, 2016 incident were

[5] Given the recent statutory amendment to section 11370.2, subdivision (c), which removed transporting a controlled substance and possession for sale of a controlled substance from the list of qualifying prior convictions, the Attorney General states that he does not address whether the trial court erred when it failed to impose sentence on the section 11370.2, subdivision (c) enhancement at defendant's resentencing. (See *People v. Milan* (2018) 20 Cal.App.5th 450, 455-456.) Any claim in that regard has therefore been waived.

dissimilar to the circumstances here, inflammatory because he had not been convicted for that incident, and could potentially confuse the jury.

The trial court denied admission of the April 17, 2000 incident, finding that it was not sufficiently probative. Regarding the May 10, 2016 incident, the court determined that "the probative value of this event is very high with respect to the issues in the current case . . . . [T]he circumstances surrounding that event, including the manner in which [defendant] was contacted, the materials in his possession, and the alleged nature of them are all extremely probative to questions of intent and knowledge . . . . And, also, there are facts related to this subsequent event that are particularly pertinent to the issues in our case because of [defendant's] association to the apartment or residence that is involved in both episodes . . . ." The court stated that it had "considered the factors of Evidence Code section 352" and "weighed and balanced those factors." The court "particularly considered undue prejudice" and also "considered the undue consumption of time [and] confusion of the issues . . . ." "Ultimately[,] [the court] believe[d] that the probative value of this event as to [defendant] and to the totality of the case that [was] before [it] outweigh[ed] those concerns."

Immediately before the evidence of the May 10, 2016 incident was admitted at trial, the trial court instructed the jury based on CALCRIM No. 375. The court told the jury that the prosecution would be "presenting evidence of other behavior by [defendant] that is not part of the charges in this case." The court instructed the jury that it could only consider the evidence "if the People prove by a preponderance of the evidence that [defendant], in fact, committed the other act." The court defined proof by a preponderance of the evidence and told the jury that "[i]f the People do not meet this burden, you must disregard this evidence entirely." The court also instructed, "If you decide that [defendant] committed the uncharged act, you may, but are not required to, consider this evidence for the limited purpose of deciding whether [defendant] acted with the intent required to prove the offense charged in this case, or whether [defendant] had

the knowledge required to prove the offense charged in this case when he allegedly acted in this case. [¶] In evaluating this evidence, consider the similarity or lack of similarity between the uncharged acts and the charged offense. Do not consider this evidence for any other purpose. Do not conclude from this evidence that the defendant has a bad character or is disposed to commit crime. [¶] If you conclude that [defendant] committed the uncharged act, that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that [defendant] is guilty of the charged crime. The People must still prove the charged crime beyond a reasonable doubt."

At the conclusion of the evidence, the trial court instructed the jury on the applicable law. The trial court again gave the jury a limiting instruction regarding the evidence of the May 10, 2016 incident based on CALCRIM No. 375.[6]

2. Legal Principles

" 'Subdivision (a) of [Evidence Code] section 1101 prohibits admission of evidence of a person's character, including evidence of character in the form of specific instances of uncharged misconduct, to prove the conduct of that person on a specified occasion. Subdivision (b) of [Evidence Code] section 1101 clarifies, however, that this rule does not prohibit admission of evidence of uncharged misconduct when such evidence is relevant to establish some fact other than the person's character or disposition.' [Citation.]" (*People v. Fuiava* (2012) 53 Cal.4th 622, 667 (*Fuiava*).) Thus,

[6] The limiting instruction given to the jury at the close of evidence differed slightly from the limiting instruction given immediately before the evidence was admitted. In particular, the trial court told the jury: "If you decide that defendant . . . committed the uncharged act you may, but are not required to, consider that evidence for the limited purpose of deciding whether defendant . . . acted with the intent required to prove the offense alleged in this case. Or defendant . . . *knew of the substance's nature or character as a controlled substance* when he allegedly acted in this case." (Italics added.)

evidence of uncharged offenses may be admitted to prove, among other things, knowledge and intent. (Evid. Code, § 1101, subd. (b).)

When deciding whether to admit evidence of other offenses, a trial court " 'must consider: (1) the materiality of the fact to be proved or disproved, (2) the probative value of the other crime evidence to prove or disprove the fact, and (3) the existence of any rule or policy requiring exclusion even if the evidence is relevant. [Citation.] Because this type of evidence can be so damaging, "[i]f the connection between the uncharged offense and the ultimate fact in dispute is not clear, the evidence should be excluded." [Citation.]' " (*Fuiava*, *supra*, 53 Cal.4th at p. 667.)

Further, because "to be admissible such evidence 'must not contravene other policies limiting admission' " (*People v. Ewoldt* (1994) 7 Cal.4th 380, 404 (*Ewoldt*)), a court must also consider the uncharged offense evidence under Evidence Code section 352. Thus, a court must "examine whether the probative value of the evidence of defendant's uncharged offenses is 'substantially outweighed by the probability that its admission [would] . . . create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.' (Evid.Code, § 352.)" (*Ibid.*)

We review a trial court's decision to admit evidence for a purpose specified in Evidence Code section 1101 for an abuse of discretion. (See *Fuiava*, *supra*, 53 Cal.4th at pp. 667-668.)

3. Analysis

Defendant contends that the trial court erred when it admitted evidence of the May 10, 2016 incident because his knowledge that the substance found in room 110 on January 20, 2016 was methamphetamine was not in dispute, nor was his intent regarding the substance. Rather, defendant asserts, "his defense [at trial] was that he did not possess the drugs and did not know they were in the cupboard." Defendant also argues that "the jury was presented with ample evidence showing that [he] used

methamphetamine," rendering evidence of his methamphetamine use on May 10, 2016 cumulative.

To obtain a conviction for possession of a controlled substance for sale, the prosecution must prove that "the defendant possessed the contraband with the intent of selling it and with knowledge of both its presence and illegal character." (*People v. Meza* (1995) 38 Cal.App.4th 1741, 1745-1746.) A "[d]efendant's plea of not guilty put[s] in issue all of the elements of the offense[], including his intent [citation], and evidence that defendant committed uncharged similar offenses would have some relevance regarding defendant's intent . . . ." (*People v. Balcom* (1994) 7 Cal.4th 414, 422-423.) Uncharged "incidents of possession of an illegal drug are [also] relevant to prove the knowledge element." (*People v. Ghebretensae* (2013) 222 Cal.App.4th 741, 754.)

Although some of the circumstances surrounding the charged offense differed from the circumstances of the May 10, 2016 incident, the requisite similarity was present to render evidence of the May 10, 2016 incident probative of defendant's knowledge and intent on January 20, 2016. For example, there was evidence that on January 20, 2016 and May 10, 2016, defendant was both using and selling methamphetamine. On each of those dates, defendant displayed objective signs that he was under the influence of methamphetamine and he possessed a pipe. On January 20, 2016, defendant possessed an amount of methamphetamine consistent with possession for sale and $532 in cash that he had no explanation for. On May 10, 2016, defendant possessed four bindles of methamphetamine that were packaged for sale and four scales. In addition, the two events occurred within months of each other and both involved defendant's room at the Western Motel. (See *People v. Scott* (2015) 61 Cal.4th 363, 398-399 [temporal proximity of five months and spatial proximity of eight blocks were considered similarities between charged and uncharged burglaries].) The uncharged misconduct was thus "sufficiently similar" to the charged offense "to support the inference that the defendant ' "probably

harbor[ed] the same intent in each instance." [Citations.]' [Citation.]" (*Ewoldt*, *supra*, 7 Cal.4th at p. 402.)

Moreover, as the Attorney General points out, defendant argued to the jury at the close of evidence that the prosecutor had to prove "every element" of the charge beyond a reasonable doubt. He also argued that "[t]he prosecutor must [prove] not only that the defendant did the acts charged, but also that he acted with a particular intent or mental state," and that a reasonable interpretation of the evidence was that he possessed the methamphetamine for personal use. Given defendant's arguments to the jury and the prosecution's burden of proof, we conclude that the May 10, 2016 evidence was probative of disputed issues.

We also determine that the evidence of defendant's methamphetamine use on May 10, 2016 was not "merely cumulative regarding an issue that was not reasonably subject to dispute" (*Ewoldt*, *supra*, 7 Cal.4th at p. 406) because it was probative of defendant's intent to commit the charged offense. Detective Deger testified that methamphetamine dealers also use methamphetamine and that he could not "ever recall speaking to somebody who was engaged in sales activity that wasn't also a user themselves." Thus, the evidence of defendant's methamphetamine use on May 10, 2016, coupled with evidence that defendant also possessed methamphetamine for sale on May 10, 2016, was probative of his intent regarding the methamphetamine possessed on the date of the charged offense.

Defendant contends that the trial court should not have allowed evidence of the May 10, 2016 incident because "the prejudicial effect of the evidence far outweighed its probative value." Defendant contends that the May 10, 2016 incident was "much more serious" than the charged offense because it included evidence that he was manufacturing methamphetamine. Defendant also asserts that the May 10, 2016 incident was "the key piece of evidence distinguishing" him from his codefendant Marciano, which would have

"likely" led the jury to improperly "use[] the evidence for an impermissible inference that [defendant] had the propensity to sell drugs."

For the reasons stated above, we agree with the trial court's assessment that the evidence of the May 10, 2016 incident was highly probative of defendant's intent regarding the charged offense. We also conclude that the May 10, 2016 incident, while serious, was not so inflammatory as to "create a substantial danger of undue prejudice." (Evid. Code, § 352.) We observe that while there was evidence that defendant possessed methamphetamine manufacturing materials on May 10, 2016, the evidence of the charged offense included defendant's possession of a significant amount of methamphetamine, which rendered the charged offense serious as well. Moreover, the trial court twice gave the jury a limiting instruction regarding the uncharged offenses evidence, which we presume the jury followed. (*People v. Case* (2018) 5 Cal.5th 1, 32.)

Finally, defendant contends that the admission of the evidence violated his right to due process under the federal constitution. However, since we have not found that the admission of the uncharged offenses evidence was error under state law, we need not decide "the consequences of that error, including . . . whether the error was so serious as to violate due process." (*People v. Partida* (2005) 37 Cal.4th 428, 437.)[7]

B. *Exclusion of Testimony Based on Witnesses' Invocation of the Privilege Against Self-Incrimination*

Defendant contends that the trial court violated his right to compulsory process when it excluded testimony from defense witnesses Mark Crawford and Vani Malley based on their invocation of the privilege against self-incrimination. We find no error.

[7] Defendant also raises the prosecutor's closing argument regarding the uncharged offenses evidence, asserting that "[t]he prosecutor invited the jury to use the evidence for an impermissible purpose," but he does not establish that the prosecutor's argument to the jury is relevant to whether the trial court properly admitted the evidence in the first instance.

1. Proceedings Below

Defendant sought to call Mark Crawford and Vani Malley as witnesses at trial. Defendant wanted to question Crawford to establish that the cell phone found in the motel room contained Crawford's phone number, Crawford knew codefendant James Marciano, and Crawford gave Marciano a cashier's check for $17,000 to purchase a Mercedes. The trial court held a hearing outside the jury's presence "to determine whether there [were] any issues raised with respect to" Crawford's testimony. Crawford appeared at the hearing represented by counsel, who informed the court that he anticipated Crawford would "assert[] his Fifth Amendment right to not answer any questions" if called as a witness.

Defendant's trial counsel questioned Crawford. Crawford "assert[ed] [his] Fifth Amendment rights" when defendant's counsel asked him whether he knew "a fellow by the name of James Marciano." He also invoked his Fifth Amendment rights when defendant's counsel asked him: if he saw anyone in the courtroom whom he recognized; whether he knew someone nicknamed "Bam Bam"; whether he allowed someone to use his cell phone on January 20, 2016; whether he owned a cell phone; whether he owned a Mercedes C350; whether his cell phone number was the particular number recited by counsel; whether he had ever spoken to defendant; whether he recognized defendant; and whether he purchased a vehicle from someone named "Jim Marciano on or about January 11, 2016." The trial court then asked Crawford whether he intended to assert his Fifth Amendment privilege "as to any question that might be asked [of him] related to any of the persons who are sitting in th[e] courtroom," and Crawford replied that he did.

The trial court found that Crawford "would assert privilege as to any question that might be asked of him that is relevant to the issues in the trial . . . ." The court also found that if called as a witness, Crawford would be questioned about: whether he had a relationship or connection to defendant or Marciano; his communication with Marciano via a phone that "the prosecution has alleged or will allege has been used to traffic in the

sale of narcotics"; and his financial transaction with Marciano. The court determined that Crawford's claim of privilege was valid because those questions "might tend to incriminate him." The court deemed Crawford unavailable as a witness.

Defendant sought to question Vani Malley to establish that she was the general manager of the Western Motel and to elicit her testimony regarding defendant's duties as the motel's facilities manager. Defendant proffered that Malley would testify that it was not usual for defendant to have between $200 and $1,000 on him for his job. Defendant also wanted Malley to provide defendant's phone number and to establish that she paid the bill for the cell phone found in the motel room. Defendant provided the trial court with a five-page report of Malley's statements.

During a hearing outside of the jury's presence, Malley, who was represented by counsel, refused to answer any of the questions posed by defendant's counsel, invoking her Fifth Amendment privilege. Malley was asked: her occupation; whether she had a connection with the Western Motel; whether she knew defendant; whether she knew defendant's phone number; whether defendant was the facilities manager at the Western Motel; and whether she knew if it was unusual for defendant to possess between $200 and $1,000 in the course of his employment at the motel. Malley stated that she would invoke the Fifth Amendment in response to any question asked.

The trial court found that Malley would assert a Fifth Amendment privilege and refuse to answer any question pertaining to her relationship with the parties, the charged offense, and the uncharged conduct. The court determined that "it [was] reasonably likely that the questions [Malley] would be asked and the answers she might be compelled to give, could tend to incriminate her . . . and that there is a valid privilege for her to assert . . . ." The court stated that its decision was "based on the circumstances of the events, including among other things, the fact that there is . . . a vehicle that has been described in the evidence as containing methamphetamine and methamphetamine manufacturing material [that] was registered to [Malley] . . . ; that she has a relationship

to some extent to Room No. 110 at the Western Motel; that she has access arguably to a storage shed" that may have contained methamphetamine manufacturing materials; and that she has allegedly had "an ongoing and relatively long-time relationship with defendant . . . ."[8] The court deemed Malley unavailable as a witness.

2. Legal Principles

The United States and California Constitutions grant a criminal defendant the right "to have compulsory process for obtaining witnesses in his favor . . . ." (U.S. Const., 6th Amend.; see Cal. Const., art. I, § 15 ["The defendant in a criminal cause has the right . . . to compel attendance of witnesses in the defendant's behalf . . . ."].) At its core, compulsory process secures "the right to the government's assistance in compelling the attendance of favorable witnesses at trial . . . ." (*Pennsylvania v. Ritchie* (1987) 480 U.S. 39, 56.) The right to compulsory process, however, is " 'not unqualified.' [Citation.]" (*People v. Woods* (2004) 120 Cal.App.4th 929, 938.) The right does not "entitle the defendant to compel a witness to waive his [or her] Fifth Amendment privilege. [Citation.]" (*Ibid.*)

The United States and California Constitutions afford every person the privilege against self-incrimination. (See U.S. Const., 5th Amend.; Cal. Const., art. I, § 15; see also Evid. Code, § 940 ["To the extent that such privilege exists under the Constitution of the United States or the State of California, a person has a privilege to refuse to disclose any matter that may tend to incriminate him [or her]."].) "The privilege against self-incrimination protects the individual from being compelled to incriminate himself [or

[8] With the exception of information regarding the vehicle's registration, the factual basis for the trial court's decision was contained in the five-page report of Malley's statements, which we discuss in detail below. (At pp. 21-22, *post*.) We have been unable to find a basis in the record for the trial court's comment that the vehicle containing methamphetamine and methamphetamine manufacturing materials was registered to Malley.

herself] in any manner; it does not distinguish degrees of incrimination." (*Miranda v. Arizona* (1966) 384 U.S. 436, 476.)

"To invoke the privilege, a witness need not be guilty of any offense; rather, the privilege is properly invoked whenever the witness's answers 'would furnish a link in the chain of evidence needed to prosecute' the witness for a criminal offense. [Citations.] To satisfy this standard, 'it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result.' [Citation.] Consistent with these principles, our Evidence Code provides that when a witness grounds a refusal to testify on the privilege against self-incrimination, a trial court may compel the witness to answer only if it 'clearly appears to the court' that the proposed testimony 'cannot possibly have a tendency to incriminate the person claiming the privilege.' (Evid. Code, § 404.)" (*People v. Cudjo* (1993) 6 Cal.4th 585, 617 (*Cudjo*).) If it does not "clearly appear[] to the court that the proffered evidence cannot possibly have a tendency to incriminate the person claiming the privilege," the proffered evidence is inadmissible. (Evid. Code, § 404.)

We review a trial court's finding that a witness could properly invoke his or her privilege against self-incrimination de novo. (See *People v. Seijas* (2005) 36 Cal.4th 291, 304.)

3. Analysis

Defendant contends the proffered testimony did not tend to incriminate Crawford or Malley, and that the trial court therefore violated his right to compulsory process when it permitted Crawford and Malley to assert their privilege against self-incrimination. We conclude otherwise.

Defendant sought to question Crawford regarding whether he knew codefendant Marciano, whether the cell phone found in the motel room contained Crawford's number, and whether Crawford had given Marciano a $17,000 cashier's check to purchase a

Mercedes. In addition, defendant's trial counsel asked Crawford whether he knew, had spoken to, or recognized defendant and whether he knew someone nicknamed "Bam Bam."

The evidence at trial established that police found Marciano in the motel room with a $17,000 cashier's check in his pocket, while located near almost an ounce of methamphetamine. A cell phone was also located in the room, and two prosecution witnesses opined that text messages on the phone were indicative of narcotics sales. Several of those text messages were from someone named "Mark" on January 20, between 1:43 p.m. and 2:28 p.m. One message from Mark stated, " 'Hey, brother, tell Bam Bam 2500.' " Another stated, " 'You can come try it before you buy it.' " The message in response stated, " 'Cory just step out. Let me get back to you in a minute.' " Police contacted defendant in the parking lot of the motel at 2:40 p.m. on January 20. Defendant was known to live in the motel room where the methamphetamine and cell phone were found.

Under these circumstances, we conclude that defendant's questioning could have " 'furnish[ed] a link in the chain of evidence needed to prosecute' [Crawford] for a criminal offense" involving narcotics sales. (*Cudjo*, *supra*, 6 Cal.4th at p. 617.) Importantly, "a witness's answers need not themselves support a conviction under a criminal statute" to provide a basis for the invocation of the privilege against self-incrimination. (*People v. Trujeque* (2015) 61 Cal.4th 227, 267 (*Trujeque*).) Moreover, if Crawford had been compelled to testify, he would have been subject to cross-examination by the prosecution, which would have subjected him to "the same danger of self-incrimination . . . ." (*People v. Lucas* (1995) 12 Cal.4th 415, 455.)

Regarding Malley, defendant sought to establish that she was the general manager of the Western Motel, an establishment that had been implicated in narcotics sales and manufacturing. Defendant was going to question her regarding his job duties as the facilities manager at the motel, whether it was unusual for him to have between $200 and

$1,000 on him, and whether she paid the bill for the cell phone found in the motel room. The trial court knew from the five-page report of Malley's statements that she ran the day-to-day operations at the motel and that defendant was her business partner and former boyfriend. The fact that Malley managed the motel, which would have given her access to the rooms and the storage area, and had a close personal and professional relationship with defendant meant that basic questions could have exposed her to prosecution for narcotics sales or manufacturing. (See *Trujeque*, *supra*, 61 Cal.4th at p. 268.) Thus, we determine that a responsive answer to defendant's questioning " 'might [have] be[en] dangerous [to Malley] because injurious disclosure could result.' " (*Cudjo*, *supra*, 6 Cal.4th at p. 617.)

Defendant also contends that the trial court "did not undertake the particularized inquiry required when a prospective witness claims the privilege." The record belies this assertion. The trial court heard defendant's proffers regarding each of the prospective witnesses and allowed defendant's trial counsel to question them. After counsel questioned Crawford, the court asked him, "Is it your intent to assert a Fifth Amendment privilege as to any question that might be asked to you related to any of the persons who are sitting in the courtroom today," and Crawford replied that it was. Counsel's last question of Malley was whether she intended to invoke regarding "whatever question [was] ask[ed]," and Malley answered affirmatively. The court then determined that any relevant question pertaining to defendant's proffer could compel testimony from Crawford and Malley that tended to incriminate them. Thus, "the record supports that the trial court made a particularized inquiry about [Crawford's and Malley's] assertion of the privilege before determining [they] 'could "legitimately refuse to answer essentially all relevant questions . . . ." ' " (*Trujeque*, *supra*, 61 Cal.4th at p. 269.)

For these reasons, we conclude that the trial court did not err in sustaining Crawford's and Malley's invocation of the Fifth Amendment privilege against self-

incrimination because their testimony could " 'possibly have [had] a tendency to incriminate' " them. (*Cudjo*, *supra*, 6 Cal.4th at p. 617.)

C. Declarations Against Penal Interest

Defendant contends that the trial court erred when it excluded evidence of Crawford's and Malley's statements. Defendant asserts that the statements were admissible as declarations against penal interest.

1. Proceedings Below

After the trial court sustained Crawford's and Malley's invocation of the privilege against self-incrimination, the court deemed them each unavailable as a witness. Defendant presented the trial court with a two-page report of statements Crawford made to defendant's investigator and requested the court to admit the statements into evidence as declarations against interest. According to the report, Crawford stated that he met Marciano through their mutual friend Bam Bam and that he would sometimes let Bam Bam used his cell phone. Crawford provided the investigator with his phone number. He did not know if he let Bam Bam use the phone on January 20, 2016. Crawford met Bam Bam because he repaired Bam Bam's bicycles. Crawford had known Marciano for approximately three years. Crawford wanted a Mercedes C350 and learned that Marciano was selling one. Crawford purchased the car from Marciano with a cashier's check for $18,000.[9]

The trial court determined that Crawford's statements did not qualify as declarations against penal interest and that the statements were not inherently reliable or uncontested.

Defendant also provided the trial court with a five-page report of Malley's statements, and asked the court to find the statements admissible as declarations against

[9] Although according to the report, Crawford stated that he purchased the Mercedes "from Jimmy for eighteen thousand dollars," police found a $17,000 cashier's check in Marciano's pocket on January 20, 2016.

penal interest. The statements relayed Malley's date of birth, education, and occupation, and defendant's phone number and cell phone model. Malley described her job duties as the manager of the Western Motel, which included running the day-to-day operations. Malley stated that defendant was the facilities manager at the motel and was in charge of all improvements and maintenance projects. Defendant typically carried between $200 and $1,000 on him. He paid his daily laborers and some expenses in cash. Defendant was the account holder of the motel's bank account.

Malley was defendant's girlfriend from 2011 to mid-2015, except during one period when they were broken up. They ended their relationship in 2015 because defendant would not agree to random drug testing or to attend a weekly support group. She only suspected defendant was using drugs in December 2015. She knew defendant had several drug arrests. Defendant occupied room 110. Defendant's room became a gathering place for people without jobs who "had a drug past," and Marciano started living there. Marciano had an extensive criminal history involving drugs. Marciano stayed in the back room. Housekeeping found some paraphernalia there. On January 20, 2016, a woman named "Dorothy" was staying with Marciano, but she was not there at the time of the arrest. Afterwards, when Malley asked Dorothy if there were any drugs or pipes in the room, Dorothy immediately searched the kitchen countertop, cupboard, and cabinet under the sink.

The trial court determined that Malley's statements did not qualify as declarations against penal interest and were not reliable.

2. Legal Principles

"In California, '[e]vidence of a statement by a declarant having sufficient knowledge of the subject is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and the statement, when made, . . . so far subjected him [or her] to the risk of . . . criminal liability . . . that a reasonable man [or woman] in his [or her] position would not have made the statement unless he [or she] believed it to be true.'

([Evid.Code,] § 1230.)" (*People v. Duarte* (2000) 24 Cal.4th 603, 610 (*Duarte*).) "As applied to statements against the declarant's penal interest, in particular, the rationale underlying the exception is that 'a person's interest against being criminally implicated gives reasonable assurance of the veracity of his statement made against that interest,' thereby mitigating the dangers usually associated with the admission of out-of-court statements. [Citation.]" (*People v. Grimes* (2016) 1 Cal.5th 698, 711 (*Grimes*).)

"The proponent of such evidence must show that the declarant is unavailable, that the declaration was against the declarant's penal interest when made and that the declaration was sufficiently reliable to warrant admission despite its hearsay character. [Citation.]" (*Duarte, supra*, 24 Cal.4th at pp. 610-611.) "The focus of the declaration against interest exception to the hearsay rule is the basic trustworthiness of the declaration." (*People v. Frierson* (1991) 53 Cal.3d 730, 745.)

"There is no litmus test for the determination of whether a statement is trustworthy and falls within the declaration against [penal] interest exception. The trial court must look to the totality of the circumstances in which the statement was made, whether the declarant spoke from personal knowledge, the possible motivation of the declarant, what was actually said by the declarant and anything else relevant to the inquiry. [Citations.]" (*People v. Greenberger* (1997) 58 Cal.App.4th 298, 334.)

We review a trial court's decision whether a statement is admissible under Evidence Code section 1230 as a declaration against interest for abuse of discretion. (*Grimes*, *supra*, 1 Cal.5th at p. 711.) Under that standard, a trial court's evidentiary ruling " 'will not be disturbed except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice.' " (*People v. Brown* (2003) 31 Cal.4th 518, 534 (*Brown*).)

3. Analysis

Defendant contends that several of Crawford's statements qualified as declarations against penal interest because they "implicated [Crawford] in drug sales activity."

Defendant points to Crawford's statement providing his phone number, which was contained in the cell phone found in room 110. Defendant also cites Crawford's statements that he knew Marciano and Bam Bam, whose name was stored on the phone. Defendant asserts, "Those statements, in combination with Officer Deger's testimony that he personally arrested Crawford in November 2016 with 34.1 grams of methamphetamine and other indicia of drug sales, were certainly evidence that Crawford had sold drugs at some point."

However, defendant has not established that those statements were necessarily "against [Crawford's] interest when made" because the record does not disclose that Crawford was aware of the statements' significance. (*Duarte*, *supra*, 24 Cal.4th at pp. 610-611.) While defendant argues that Crawford was aware of the criminal case pending against defendant when he made the statements because the person taking the statements identified herself as an investigator working on defendant's behalf, that does not establish that Crawford knew that a cell phone containing his number and Bam Bam's name was found in the motel room or that Marciano was located by police there. On their own, the statements simply conveyed Crawford's phone number and that he knew Marciano and Bam Bam. Neither amounted to a statement that would "subject its declarant to criminal liability such that a reasonable person would not have made the statement without believing it true." (*People v. Jackson* (1991) 235 Cal.App.3d 1670, 1678, fn. omitted.)

Regarding Malley's statements, defendant contends that "she knew or should have known that the statements could implicate her in criminal activity" because she was interviewed by defendant's trial counsel. Defendant argues that if this court determines that the trial court properly sustained Malley's invocation of her privilege against self-incrimination, we should conclude that Malley's statements regarding "her knowledge of the motel and [defendant's] finances, cell phone, and job duties" qualified as declarations against interest because they "tended to implicate her in criminal activity . . . ."

The standard for determining whether testimony cannot be compelled because it could be self-incriminating and the standard for determining whether a statement qualifies as a declaration against interest are vastly different. As stated above regarding the privilege against self-incrimination, "the proffered evidence is inadmissible unless it *clearly appears* to the court that the proffered evidence *cannot possibly have a tendency to incriminate* the person claiming the privilege." (Evid. Code, § 404, italics added.) A statement qualifies as a declaration against interest, on the other hand, if "the statement, when made, . . . so far subjected [the declarant] to the risk of civil or criminal liability . . . that a reasonable man [or woman] in his [or her] position would not have made the statement unless he [or she] believed it to be true." (Evid. Code, § 1230.) While the former involves a statement that *could possibly be* incriminating, the latter involves a statement that *must* subject someone to the risk of civil or criminal liability.

We conclude the trial court did not abuse its discretion when it found that neither Crawford's nor Malley's statements qualified as declarations against penal interest. The statements themselves were innocuous and the record does not disclose the depth of Crawford's or Malley's knowledge of the case against defendant when the statements were made. (Cf. *Brown*, *supra*, 31 Cal.4th at p. 536 [record established declarant who admitted hearing a gunshot and participating in stealing the victim's truck "knew he was being charged with murder"].)

IV. DISPOSITION

The judgment is affirmed.

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BAMATTRE-MANOUKIAN, J.

WE CONCUR:

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ELIA, ACTING P.J.

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MIHARA, J.

People v. Herbst
H044623
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